

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1416

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

RAYMOND LEO COWLES,
Defendant-Appellant.

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DOCKET NO. 74-1416

APPENDIX



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1 alibi defense. He said he had only seen Stretch
2 once since 1969. Is that the kind of a statement
3 an innocent man would make?

4 Ladies and gentlemen, we have reviewed Mr.
5 Cowles' statement on September 10, we have reviewed
6 Mr. Gaither's testimony, we have reviewed the testi-
7 mony of five eye witnesses everyone of whom says
8 Cowles is the man and they say it positively.

9 Mr. Clary is curious and concerned about the
10 \$36,000 that is still missing and the man in the
11 orange parka that is out there on the streets of
12 Watertown somewhere, and we are, too. Don't let
13 Cowles and his friend reap the rewards of this
14 crime. We strenuously urge you to return a verdict
15 of guilty.

16 THE COURT: We will take a very short recess.

17 (Thereupon a short recess was taken after which
18 the hearing was resumed.)

19 THE COURT: Before beginning this charge, I
20 want to add my thanks to those of the lawyers for
21 your prompt attendance at each of our sessions despite
22 the inclement weather and snow storms, and to express
23 my thanks also for your patience with some delays
24 that we have encountered, and to assure you that
25 those delays were unavoidable and no one's fault.

1 It now becomes my function and duty to instruct
2 you on the law that applies to this case, and it is
3 your duty to accept the law as I give it to you in
4 these instructions whether or not you agree with them.
5 In short, I am the exclusive judge of the law.

6 Now just I am the exclusive judge of the law,
7 you are the exclusive judge of the facts. You and
8 you alone decide what weight, what effect and what
9 value you give to the evidence. You decide or -
10 whether or not you will believe a witness, and of
11 course ultimately you decide the guilt or innocence
12 of this defendant.

13 Now you are not to conclude from any rulings
14 that I have made throughout this trial, or any
15 questions that I may have asked, that I have any
16 opinion one way or the other as to the guilt or
17 innocence of the defendant. That decision is
18 exclusively your function.

19 Now how do you go about finding the facts in
20 your search for the truth? Finding the facts is
21 merely a process by which you the jury consider
22 the exhibits which have been received in evidence
23 and the testimony of all of the witnesses on direct
24 and on cross examination, sift out what you believe,
25 weigh it in the scale of your reasoning powers and

1 common sense, and draw such conclusions as your
2 experience and common sense tell you the evidence
3 supports and justifies, and decide just where the
4 truth lies in this case.

5 Now in this connection all evidence is of two
6 general types, direct evidence and circumstantial
7 evidence. Evidence is direct when the facts are
8 shown by exhibits which are admitted into evidence
9 or when sworn to by witnesses who have actual know-
10 ledge of what they have seen or what they have heard.
11 For example, in this case we heard Mrs. Schultz
12 testify it was a bright sunny day. That is direct
13 evidence. We heard George Eiss testify that he kept
14 his air conditioner on while he went into the bank.
15 That is direct evidence. From those two bits of
16 direct evidence, by applying your every day common
17 sense, you infer that it was a hot day, August 30,
18 1973 at 10:30 in the morning it was hot. That is
19 circumstantial evidence that you drew from the two
20 facts that were in direct evidence, the sun shine,
21 leaving on the air conditioning.

22 I am sure you all use that process in your
23 everyday life. No greater of -- no greater degree
24 of certainty is required when of evidence is circum-
25 stantial than when it is direct, for in either case

1 you must be convinced beyond a reasonable doubt
2 before you can find the defendant guilty.

3 Now it is your memory of the evidence that
4 controls, it is not the way I remember it nor the
5 way the lawyers remember it. If your memory squares
6 with what the lawyers told you when they summed up
7 their version of what the evidence showed here, you
8 may accept what they said. But if you have a differ-
9 ent recollection of it, you are bound by your oath
10 to reject their version of the evidence and to accept
11 and rely on your own memory. And what I said as to the
12 lawyers also applies to me.

13 Now I don't intend in this case to attempt to
14 summarize the evidence. It hasn't been a complicated
15 case. I watched all of you as the witnesses testified.
16 I know you paid very careful attention to the evidence,
17 and so the Court will rely on your memory of the
18 evidence except here and there I may touch on it as
19 I just did with Mrs. Schultz and Mr. Eiss simply to
20 illustrate a point or to focus your attention on the
21 problem involved.

22 Now it is your exclusive function to decide which
23 witnesses you will believe, and this is so as to every
24 witness, whether called by the Government or by the
25 defense.

1 Now you are not to be influenced by the number
2 of witnesses called by either side or by the number
3 of documents received in evidence. Your concern is
4 not with the quantity of the evidence, but with the
5 quality of the evidence. The first test which you
6 ought to apply in determining the trustworthiness of
7 a witness is to measure what he says against your
8 everyday common sense. You are not bound to believe
9 unreasonable statements or to accept testimony that
10 defies your common sense or insults your intelligence
11 just because the statements are made under oath on a
12 witness stand in a public Court room.

13 You saw the witnesses in this case. In de-
14 ciding whether to believe a witness, you should
15 consider his conduct and his manner on the stand.
16 I saw you watching these witnesses with particular
17 care as they were testifying. Obviously you were
18 sizing them up. How did the witness impress you?
19 A -- Was he or she being frank with you? Was he
20 being evasive? Was the witnesses' version supported?
21 Was the witness trying to conceal some of the truth?
22 Was the witness just parroting answers or repeating
23 a fabricated story? Did the witness have any motive
24 to testify falsely? Is the witness interested of --
25 is he interested in the outcome of this case in any

1 way? How strong or weak was the witnesses memory?
2 In short, can you rely on him, can you trust the
3 witness. Did the witness show any bias or prejudice
4 or hostility or friendliness for any party?

5 You ought to consider also the witnesses
6 opportunity to know the facts about which he testi-
7 fied, and the probability or the improbability of
8 what he said. How does the witnesses testimony add
9 up when considered with all the other evidence? How
10 far does his story check out? Are there any incon-
11 sistencies in the witnesses testimony, and if so,
12 how important are they? Has the witness made any
13 inconsistent statement on an earlier or prior
14 occasion? And if so, how important are those incon-
15 sistencies? And in considering whether there is an
16 inconsistency, you ought to consider not only what he
17 said on the prior occasion but what he failed to say.

18 Now the witness Gaither testified that he had been
19 convicted of a crime, the crime of bank robbery, that
20 he had pled guilty to that. You should consider that
21 fact in determining his credibility and the weight to
22 be given to his testimony.

23 The defendant Cowles testified as a witness. He
24 was not required by law to do so, and his appearance
25 as a witness was entirely voluntary on his part. If

1 he had not testified, his failure to do so could not
2 have been considered by you in any manner in deter-
3 mining his guilt or innocence, but having testified,
4 the law requires that the testimony be judged and
5 appraised by the same standards applied to the testi-
6 mony of other witnesses, giving consideration, of
7 course, to his background, to his personality, to his
8 manner on the stand and to his natural interest to
9 the outcome of this trial.

10 Now if you find that any witness has deliberately
11 and willfully lied with respect to any material fact
12 in his or her testimony offered at this trial, you
13 may follow either one of two courses, you may accept
14 as much of the witnesses testimony as you believe, or
15 if you wish you can reject his entire testimony.

16 Now before discussing the crime charged here,
17 I want to remind you that an indictment is a mere
18 accusation, it is not evidence of the truth of the
19 charge made, and you are to draw no inference of
20 guilt from the mere fact that this defendant has
21 been indicted. An indictment simply means that the
22 defendant has been accused of a crime.

23 The defendant has denied the charges made
24 against him both by his plea of not guilty and by
25 his testimony on the witness stand.

1 Defendant has no burden of proof to sustain
2 in this case, he is under no obligation to produce
3 any evidence, any documentary evidence or even to
4 call any witnesses. He is presumed to be innocent,
5 and this presumption of innocence remains with him
6 throughout the trial and during the deliberations
7 of the jury. This presumption is overcome when and
8 only when the Government establishes the guilt of a
9 defendant beyond a reasonable doubt.

10 Now what do I mean by beyond a reasonable doubt?
11 As the phrase implies, a reasonable doubt is a doubt
12 that is based upon reason, a reason which appears in
13 the evidence or in the lack of evidence. It is not
14 some vague, speculative, imaginary doubt, nor a doubt
15 based upon an emotion or sympathy or prejudice or
16 upon what some juror might regard as an unpleasant
17 duty. The Government is not required to prove a
18 defendant's guilt beyond a -- beyond every possible
19 doubt nor to an absolute or mathematical certainty,
20 because such measure of proof is usually impossible
21 in human affairs.

22 You should review all of the evidence as you
23 remember it, sift out what you believe and discuss
24 and listen, weigh and compare your view of the
25 evidence with your fellow jurors. If that process

1 produces a solemn belief or conviction in your
2 mind such as you would be willing to act upon
3 without hesitation if this were an important
4 matter of your own, then you may say that you have
5 been convinced beyond a reasonable doubt. On the
6 other hand if your mind is waivering or so uncertain
7 that you would hesitate before acting if this was an
8 important of your own, then you have not been con-
9 vinced beyond a reasonable doubt and your verdict
10 must be not guilty.

11 At the outset, I wish to point out that al-
12 though the indictment here originally contained
13 four counts, only Count I remains for your consid-
14 eration. The Court and counsel have done that, we
15 have eliminated these other Counts in the interests
16 of getting rid of unnecessary complexity and
17 simplifying the issues for your consideration in
18 this case, because in fact there is only one trans-
19 action here. These matters were solely a matter of
20 law and convenience, and in our effort to focus
21 your attention on the real issues in this case, and
22 you are not to draw any inference one way or the
23 other the -- for the elimination of the earlier and
24 other Counts.

25 In order that you may be guided in your

1 deliberations on Count I, I am going to hand your
2 foreman a copy of the indictment. Now Count I you
3 will notice names two defendants, Raymond Leo Cowles
4 and John Doe, a person whose name is to the Grand
5 Jurors unknown. You must render your verdict only
6 with respect to the defendant Cowles. He is the
7 only defendant on trial.

8 Although in considering his guilt or innocence
9 you may have to determine the nature of the partici-
10 pation, if any, of the other defendant, John Doe.

11 Now Count I of the indictment charges that on
12 or about August 30, 1973 at Pamelia, New York,
13 Raymond Leo Cowles, the defendant on trial, and John
14 Doe, a person whose name is to the Grand Jury unknown,
15 by intimidation did take from the person and presence
16 of Alice Kingsbury, Catherine Olszewski and Myrna
17 Cauley about \$35,640 in money belonging to and in
18 the care, custody, control, management and possession
19 of the Marine Midland Bank Northern, the deposits of
20 which were then issued by the Federal Deposit Insur-
21 ance Corporation.

22 In order to establish the charge contained in
23 Count I, the Government must prove to your satisfac-
24 tion beyond a reasonable doubt each of the following
25 three elements: One, that the deposits of the Marine

1 Midland Bank Northern, Seaway Plaza Branch, Pamelia,
2 New York, were insured by the Federal Deposit Insur-
3 ance Corporation on August 30, 1973. There is no
4 dispute in the evidence, and indeed there is a
5 stipulation by the parties that those deposits were
6 insured by the Federal Deposit Insurance Corporation
7 on that date. So you have nothing to decide on that
8 first element. That first element is agreed upon and
9 conceded.

10 Two, the second element, that someone, this
11 doesn't have to be the defendant, knowingly, willfully
12 and intentionally took money which belonged to or was
13 in the care, custody, control, management and possess-
14 ion of the bank from the person and presence of a
15 bank employee, Alice Kingsbury, Catherine Olszweski
16 and Myrna Cauley. Again there is no dispute in the
17 evidence that John Doe here, the man in the orange
18 windbreaker, entered the bank, held up the tellers
19 with a gun and took money from the possession of the
20 bank. Again the parties, the defense counsel in his
21 summation conceded that someone robbed a bank.

22 The third element is that in taking the money the
23 man who robbed the man actually intimidated a bank
24 employee. Now when I say intimidation, I mean he must
25 frighten or put the bank employee in fear. The fear

1 must arise from something that the person allegedly
2 committing the offense does rather than from timidity
3 on the part of the victim. It is not necessary,
4 however, that the victim become hysterical or show
5 that she was frightened. A taking by intimidation
6 must be established by proof of one or more acts or
7 statements of the person allegedly committing the
8 offense which was done or made in such a manner and
9 under such circumstances as would produce in the
10 ordinary person fear of bodily harm, and I am sure
11 you will recall the testimony with respect to the
12 man with the gauze mask over his face, the windbreak-
13 er, vaulting over the counter, brandishing a gun,
14 directing people around, directing Miss Cauley to
15 fill the bag with money and then leaving.

16 You must also recall the description of the
17 gun. However, actual fear need not be proved. Fear
18 may be inferred from statements made and acts done by
19 the person allegedly committing the offense and from
20 all the surrounding circumstances shown by the evi-
21 dence in this case.

22 Here there is no dispute in the evidence that
23 the defendant John Doe was armed with a gun and that
24 he forced the teller to fill the bag with money. It
25 is for you to decide whether the teller was

1 intimidated or frightened by those acts, and all the
2 circumstances.

3 Now the Government here, it is for you to de-
4 cide whether John Doe committed a robbery of the bank,
5 whether all of the elements of that crime have been
6 satisfied beyond a reasonable doubt just as I read
7 them to you, whether all three of those elements were
8 proved beyond a reasonable doubt.

9 Now if you find that they were, then you come
10 to this defendant who is on trial here. If you find
11 that they were not, drop your deliberations if you
12 find that John Doe did not rob the bank in accordance
13 with the law as I have just given it to you, drop
14 your deliberations, you have nothing further to
15 consider, and return a verdict of not guilty.

16 On the other hand, if you decide that John Doe
17 did rob the bank in accordance with the law as I
18 have given it to you, then you go on to consider the
19 guilt of this defendant.

20 Now the Government doesn't charge here, nor
21 does the Grand Jury, that this defendant personally
22 robbed this bank himself. Well -- rather the charge,
23 is that he aided and abetted John Doe in committing
24 the robbery. Now in that connection the Federal law
25 provides in pertinent part that whoever commits an

1 offense against the United States -- and robbing a
2 bank where the deposits are insured is an offense
3 against the United States -- or aids, abets, counsels,
4 commands, induces or procures its commission, is
5 punishable as a principle. Now this is what we call
6 abetting and aiding.

7 You will recall the testimony that a blue car
8 occupied by a driver was sitting outside the bank,
9 and that a man in an orange windbreaker and gauze
10 mask came out of the bank, got into the car, slid
11 down on the floor in the passenger side of the car
12 and was driven away. Eye witnesses identified the
13 defendant Cowles as the driver of the car. Now in
14 order to convict the defendant as an aider and abettor,
15 it is not necessary for the Government to show that
16 the defendant Cowles personally robbed the bank. A
17 person who aids and abets another to commit a crime is
18 just as guilty of that crime as though he committed it
19 himself. Accordingly you may find the defendant
20 Cowles guilty of the charge contained in Count I if
21 you find beyond a reasonable doubt that he aided and
22 abetted John Doe in the commission of the crime
23 charged here.

24 Before you can convict the defendant for aiding
25 and abetting, however, you must find that the crime

1 was committed here by John Doe and that the defendant
2 knew it and that he consciously associated himself
3 with the criminal venture, with the intent that his
4 conduct would aid in its success. In other words,
5 here, that he would enable the robber to get away.

6 You must be convinced beyond a reasonable doubt
7 that he was doing something to forward the crime, that
8 he was a conscious, knowing participant rather than
9 a mere bystander or spectator, that he had some stake
10 in the success of the crime.

11 If you find that these factors were present
12 beyond a reasonable doubt, then you may find that
13 the defendant is guilty as an aider and abettor.

14 The key question for you in this case is whether
15 the defendant Cowles was the man driving the car.
16 Now the defendant testified that he was not the
17 driver and he did not participate or have anything
18 to do with the robbery, nor in deed was in -- nor
19 indeed was he anywhere in the vicinity of that bank
20 on that day. He swore that he was not present at
21 the scene and he offered the testimony of John Johnson
22 and Wayne Prosser to the effect that he was not in the
23 vicinity of the bank but on Court Street in the
24 center of Watertown at about the time of the crime.
25 Thus evidence had -- has been introduced that the

1 defendant was not present at the time when and the
2 place where this crime was allegedly committed. This
3 is known in law as the defense of alibi.

4 You must bear in mind, however, that the defendant
5 does not have to establish an alibi, because he has
6 no burden of proof to sustain in this case and you
7 cannot convict him unless the Government proves be-
8 yond a reasonable doubt that the defendant was present
9 at the time and place where the alleged crime was
10 committed.

11 In short, the burden of proving that he was there
12 is on the Government. There was no burden on the
13 defendant to prove that he was not there.

14 If after considering the evidence -- all the
15 evidence -- you have a reasonable doubt whether the
16 defendant was present at the time and place of the
17 alleged offense, you must find him not guilty.

18 Agent Zawosky testified that he interviewed the
19 defendant on the morning of September 11 -- September
20 10, eleven days after the commission of the crime, and
21 that when asked the defendant stated that at 10:30 on
22 the morning of August 30, 1973 he was at his girl's
23 or his grandmother's house sleeping. He also denied
24 that he was anywhere near the bank. You will recall
25 the defendant's testimony here that at the time

1 about 10:30 or quarter to eleven in the morning he
2 was on Court Street in the center of Watertown driv-
3 ing a white stationwagon accompanied by Stretch
4 Johnson, John Johnson and Wayne Prosser and that they
5 were on their way out of town for a swim at Crystal
6 Lake.

7 Now it is for you to decide whether the defend-
8 ant's statement to Agent Zawosky was true or false.
9 If you find that they were false, you should ask
10 yourselves whether he made false statements in an
11 attempt to cast suspicion away from him, or in an
12 attempt to mislead Agent Zawosky.

13 If you decide that the statements were deliber-
14 ately false and that the defendant knew that they
15 were false, then you can consider such false ex-
16 planations as some evidence of the defendant's
17 consciousness of guilt, of a guilty state of mind.

18 Now the Government has offered the testimony
19 of eye witnesses who identified the defendant as the
20 man seen in the driver seat of the getaway car. Each
21 of these witnesses was positive of his identification
22 of the defendant as the driver. That testimony should
23 be considered by you, but it does not relieve you of
24 your duty to consider the witnesses testimony care-
25 fully, and to reject the identification if you find

1 that it is not reliable.

2 Now the reliability of an identification by an
3 eye witness obviously depends upon all of the
4 surrounding circumstances. You should look into the
5 relationship of the witness and the person observed.
6 For example, if you know someone it is easy to
7 recognize them, but if they are strangers then it is
8 not so easy. So you ask yourselves did these wit-
9 nesses know the driver of this car or where-- or
10 were the witnesses strangers. Was the witness a
11 mere bystander or a victim of the crime. Did the
12 witness know that a crime was being committed or was
13 taking place? Was the attention of the witness
14 focused on the driver or was the witness preoccupied
15 and distracted?

16 The opportunity of a witness to observe the
17 driver of the car at the time of the incident is
18 of very great importance in determining the reliability
19 of the witnesses' identification. You should there-
20 fore consider all of the circumstances shown in the
21 evidence which bear on the ability, the opportunity
22 and the motivation of the witness to make a careful
23 observation and to form and retain a definite image
24 of the driver in his mind. You should thus consider
25 such factors as the condition of the witnesses eye

1 sight, his age, his range of vision and whether or
2 not his view was clear or obstructed, his mental
3 faculties and his emotional state at the time of the
4 observation. You should also consider the length of
5 time the witness was able to observe the driver, the
6 lighting conditions, the distance between the driver
7 and the witness, any distinctive physical character-
8 istics, facial expressions or mannerisms of the driver,
9 and his attire and general appearance. In this
10 connection you should weight to any description the
11 witness gave of the driver before looking at any
12 composite picture or photographs or viewing anyone in
13 a lineup.

14 You should ask yourselves how their descriptions
15 tally with the actual appearance of the defendant
16 and if there were differences, how important were
17 they?

18 There was evidence that all of the witnesses
19 who identified the defendant on this trial also
20 identified him on earlier occasions, either by
21 giving a description to the FBI, or in the case of
22 Mrs. Schultz, by assisting the artist in making a
23 composite picture, or by selecting his picture from
24 among a group of photographs, or by picking him out
25 of a lineup of six men, or by pointing him out on a

1 prior trial, or by all of these procedures. The
2 circumstances of those earlier identification pro-
3 cedures should be considered by you in determing the
4 reliability of the witnesses identification upon this
5 trial.

6 Thus as to the photographic or lineup identifi-
7 cation, some of the factors you should consider are
8 the lapse of time between the witnesses' initial
9 observation of the driver of -- at the scene of the
10 crime and when he viewed the photograph in the lineup,
11 the time of day the viewing sessions were held and
12 their duration, the witnesses' physical and emotional
13 state at those times, the number of persons present
14 at the viewing sessions, the number of photographs
15 shown to the witness, and whether the defendant's
16 picture was among them. The number of persons in
17 the lineup, and whether they were of similar age,
18 height, weight, color and race, dress and overall
19 appearance. Whether the witness was able to identify
20 the defendant as the driver at the time he viewed the
21 picture and the lineup, and if so, whether his
22 identifications were quick and certain or whether
23 they were hesitant and uncertain, and whether the
24 witness was able to identify the defendant at times
25 prior to the viewing sessions.

1 You ought also to ask whether in the de-
2 scription he gave before viewing any photographs,
3 composite picture or lineup matched the actual
4 appearance of the defendant as you observed him
5 here in this Court room.

6 The circumstances of the witnesses in Court I
7 identification of the defendant as the driver of the
8 car may also be considered by you in determining the
9 reliability of the witness. Hear some of the
10 factors are the lapse of time between the initial
11 observation of the driver by the witness at the
12 scene of the crime and his trial, and their inter-
13 vening observations of him from photographs, lineups,
14 composite pictures on earlier occasions. The wit-
15 nesses observation that counsel -- the witnesses'
16 observation at counsel table, the testimony of the
17 witness on direct and cross examination as to the
18 basis of his identification, and whether the witness
19 was able to identify the defendant on previous
20 occasions.

21 In short what you are concerned with here is
22 whether these eye witnesses are identifying this
23 defendant as the driver of this car on the basis of
24 an image they formed at the time of the crime, or
25 whether their identification is the result of some

1 suggestion intervening between the time of the
2 crime and this trial.

3 You should therefore decide whether the wit-
4 ness is able to identify the defendant here in
5 Court as the driver of the getaway car because of
6 the image he formed from his independent observation
7 of the driver of the time and scene of the crime,
8 or whether the identification procedure is used
9 either before or at the time that the witness viewed
10 the photographs or the lineup of the defendant prior
11 to trial were so suggestive as to give rise to a
12 substantial likelihood of mistaken identification.

13 Consider all of the evidence. If you find that
14 the Government has failed to prove beyond a reasonable
15 doubt that the defendant Cowles was the driver of the
16 getaway car and aided and abetted another in the
17 robbery of the bank, you should find the defendant
18 not guilty.

19 On the other hand if you find that the Govern-
20 ment has proved beyond a reasonable doubt that the
21 defendant Cowles was the driver of the car and aided
22 and abetted another in the robbery of the bank, you
23 should find the defendant guilty.

24 Now you are instructed that the question of
25 possible punishment of the defendant in the event

1 of a conviction is of no concern of yours and you
2 should not in any sense enter into or influence your
3 deliberations. The duty of imposing sentence in the
4 event of a conviction rests exclusively upon the
5 Court. The function of the jury is to weigh the
6 evidence in the case and determine the guilt or
7 innocence of the defendant solely upon the basis
8 of such evidence.

9 When you retire to the jury room, treat each
10 other with consideration and respect, as I know you
11 will. If differences of opinion arise, discussion
12 should be dignified, calm, intelligent.

13 Your verdict must be based on the evidence and
14 the law. The evidence which was presented in this
15 case as you remember it and the law as given to you
16 in this charge.

17 You are each entitled to your own opinion. No
18 juror should acquiesce in a verdict against his
19 individual judgment, nevertheless no one should
20 enter a jury room with such pride of opinion that
21 they refuse to change their mind no matter how
22 convincing the argument of a fellow juror or
23 jurors.

24 Discussion and deliberations are part of our
25 democratic jury process, and you should approach your

1 deliberations in that spirit. Talk out your
2 differences. Each of you should in effect decide
3 the case for himself or herself after thoroughly
4 reviewing the evidence and frankly discussing it
5 with your fellow jurors with an open mind and with
6 a desire to reach a verdict. If you do that you will
7 be acting in the true democratic process of the
8 American jury system.

9 There are 12 of you on this jury, the alternates
10 will be excused before you retire for your delibera-
11 tions. Any verdict must be the unanimous verdict of
12 all of you, and it must represent the honest conclu-
13 sion of each of you.

14 I submit the case to you with every confidence
15 that you will fully measure up to the oath which you
16 took as members of the jury to decide the issues
17 submitted to you fairly and impartially and without
18 fear or favor.

19 Now member of the jury, if you find that the
20 Government has failed to establish the guilt of the
21 defendant beyond a reasonable doubt, you should
22 acquit him. If you find that the defendant has not
23 violated the law you should not hesitate for any
24 reason to render a verdict of not guilty.

25 But on the other hand if you find that the

1 Government has established the guilt of the defendant
2 beyond a reasonable doubt, you should not hesitate
3 because of sympathy or any other reason to render a
4 verdict of guilty.

5 When you retire to the jury room you will elect
6 a foreman or forelady from among your number, and
7 your foreman or forelady will return an oral verdict
8 in open court of guilty or not guilty on Count I.

9 Are there any exceptions, gentlemen? If so, I
10 will hear you at the bench.

11 MR. CLARY: I have one, Your Honor.

12 (The following proceedings took place at the
13 bench out of the hearing of the jury.)

14 MR. CLARY: I would except to that portion of
15 your charge that has to do with the exculpatory
16 statement on agent Zawosky, what he actually testified
17 to.

18 THE COURT: I note your exception.

19 MR. LOWE: The Government has none.

20 (The following proceedings took place in the
21 hearing of the Jury.)

22 THE COURT: The alternate jurors are now
23 excused until Tuesday morning at 10:15. Thank you
24 very much.

25 (At 3:45 p.m. the Jury was sworn in charge of

1 the Marshalls to begin their deliberations.

2 *****

3 (4:27 p.m. the Jury returned to the Court
4 room. Counsel and the defendant were present.)

5 THE COURT: I have your note. I will have
6 the Reporter read you Wayne Prosser's testimony,
7 then we will send the map in; I take it the map on
8 the board is the one you want?

9 (The Reporter read back the testimony of Wayne
10 Prosser.)

11 THE COURT: All right, you may resume your
12 deliberations.

13 (The Jury returned to their deliberations.)

14 *****

15 (9:50 p.m. attorneys and defendant in the
16 Court room without the Jury.)

17 THE COURT: Bring in the Jury.

18 (The Jury was returned to the Court room.)

19 THE COURT: I have your note stating that you
20 are in disagreement. I am sorry, I can't accept
21 that at this stage. You began your deliberations
22 rather late in the day. You took two hours for
23 dinner and you haven't really been working all that
24 long. So the Court is going to sequester the Jury
25 for the night and have you return in the morning,

1 at which time I will give you further instructions
2 and you will then resume your deliberations.

3 Now don't talk about the case any further
4 tonight. You have had a long hard day. Get a
5 good rest and come back tomorrow morning and we
6 see if we can't resume your deliberations, perhaps
7 not being tired.

8 Good night. Return at 10:00 in the morning.
9 The Marshall will bring you back. You will be
10 under his tutelage. You will all be staying in a
11 motel.

12 (Thereupon the jury was sequestered at 9:52
13 p.m.)

14 (The following proceedings took place out of
15 the presence of the Jury.)

16 MR. CLARY: At this time I would like to make
17 a motion on the record in behalf of the defendant
18 to declare a mistrial and withdraw a juror on the
19 grounds that it appears there is substantial dis-
20 agreement of the jury, and that a unanimous verdict
21 would not be a just and impartial verdict, and I
22 think at this point a mistrial motion is in order.

23 THE COURT: Denied.

24 MR. CLARY: Exception.
25

1 (The jury returned to their deliberation on
2 Tuesday, February 12, 1974 at 10:00 a.m.)

3 (The jury was returned to the Court room.)

4 THE COURT: I hope you had a good night's
5 sleep and are prepared for your work today.

6 I have your note saying that you are in dis-
7 agreement, but as I noted last night you hadn't
8 really been working very long. You didn't get the
9 case until sometime after 4:00, and then around
10 6:00 you went out and didn't come back back until
11 8:00, you were out for dinner, and you only had
12 been working a couple of hours and you reported
13 your disagreement, and that is not very long in a
14 case of this importance, a case that has taken this
15 long to try, all the number of witnesses that were
16 here and the problems that we had, and you remember
17 that in my instructions I said to you that the
18 essential of the American jury system is jury dis-
19 cussion, the democratic process of talking out your
20 differences, laying your ideas on the table, stating
21 your reasons for your position, listening to the
22 arguments of your fellow jurors and to their reasons,
23 and see if you can thrash out your differences.

24 Now in a large proportion of cases absolute
25 certainty cannot be expected.

1 Although the verdict must be the verdict of
2 each individual juror and not a mere acquiescence
3 in the conclusion of his fellow jurors, you should
4 examine the question submitted with candor and with
5 a proper regard and deference to the opinions of
6 each other.

7 It is your duty to decide this case, if you
8 can conscientiously do so. You should listen with
9 a disposition to be convinced to each other's argu-
10 ments. If much the larger number is for conviction,
11 a dissenting juror or jurors should consider whether
12 his or their doubt is a reasonable one when it makes
13 no impression upon the minds of so many other jurors
14 who are equally honest, equally intelligent, equally
15 impartial, and who like yourself come here as repre-
16 sentatives of the community with no axe to grind.

17 Now if upon the other hand the majority is for
18 acquittal, the minority ought to ask themselves
19 whether they cannot reasonably doubt the correctness
20 of a judgment which was not concurred in by the
21 majority. While undoubtedly the verdict of the
22 jury should represent the opinion of each individual
23 juror and it might -- it by no means follows that
24 opinions may not be changed by conference in the
25 jury room, the very object of the jury system is to

1 secure unanimity by a comparison of views and by
2 arguments among the jurors themselves.

3 Now what I have just stated to you is based
4 on an opinion of the Supreme Court of the United
5 States granted many, many years ago, and in a
6 situation like this where the Judge there told the
7 jury substantially what I have told you here.

8 Now if you wish any of the testimony reread
9 or any of the charges reread, the Court would be
10 only too willing to do it if your foreman will send
11 me a note, but I urge you now to resume your de-
12 liberations and listen to each other's views.

13 (Thereupon the jury retired to their delibera-
14 tions at 10:15 a.m.)

15 (The following proceedings took place out of
16 the hearing of the jury.)

17 MR. CLARY: Your Honor, just for the record I
18 would renew the motion I made at 10:00 last night
19 and except to the continuing to the -- of the jury
20 deliberations.

21 THE COURT: Yes, the record ought to note that
22 the Court does not know, except for the fact that
23 there is a disagreement, and the number of those
24 are -- the number of those disagreeing or dissenting
25 I don't know which way the jury stands, whether it

1 holds out for conviction or acquittal the Court
2 has no idea. So I deny your motion.

3 (Thereupon the recess of the Court was taken.)

4 (11:08 a.m. Court in session with the attorneys
5 and defendant present and without the jury.)

6 THE COURT: Bring in the jury.

7 (The jury was returned to the Court room.)

8 THE COURT: I have the note from your foreman
9 saying "We would like to hear Mrs. Palmer's testimony,"
10 and I have asked the Court Reporter to read it to you.

11 (The Reporter read the direct and cross examina-
12 tion of Mrs. Palmer to the jury.)

13 THE COURT: All right, you may resume your
14 deliberations.

15 (Thereupon at 11:37 a.m. the jury returned
16 to their deliberations.)

17 *****

18 (12:02 p.m. Court in session with the attorneys
19 and defendant present in the Court and without the
20 jury.)

21 THE COURT: Bring in the jury.

22 (The jury was returned to the Court room.)

23 CLERK OF THE COURT: Ladies and gentlemen of
24 the Jury, have you agreed upon a verdict, if so,
25 how do you find the defendant and who shall say for

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs

RAYMOND LEO COWLES
Defendant-Appellant

Northern District of
New York
Criminal No. 73-CR-167

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

RAYMOND LEO COWLES

INDICTMENT

Criminal No. 73-CR-167

Vio: 18 U.S.C. §§371,
2113(a), (b), (d), 2.

COUNT I

THE GRAND JURY CHARGES:

On or about August 30, 1973, in the Northern District of New York, at Pamelia, New York, RAYMOND LEO COWLES and John Doe, a person whose name is to the grand jurors unknown, by intimidation, did take from the person and presence of Alice A. Kingsbury, Katherine J. Olszewski, and Myrna Cauley, about \$36,640.00 in money, belonging to and in the care, custody, control, management and possession of the Marine Midland Bank-Northern, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT II

THE GRAND JURY FURTHER CHARGES:

On or about August 30, 1973, in the Northern District of New York, at Pamelia, New York, RAYMOND LEO COWLES and John Doe, a person whose name is to the grand jurors unknown, did take and carry away, with intent to steal and purloin, from the Marine Midland Bank-Northern, the deposits of which were then insured by the Federal Deposit Insurance Corporation, the sum of about \$36,640.00 belonging to and in the care, custody, control, management and possession of the said bank.

In violation of Title 18, United States Code, Sections 2113(b) and 2.

COUNT III

THE GRAND JURY FURTHER CHARGES:

On or about August 30, 1973, in the Northern District of New York, at Pamela, New York, RAYMOND LEO COWLES and John Doe, a person whose name is to the grand jurors unknown, did take and carry away, with intent to steal and purloin, from the Marine Midland Bank-Northern, the deposits of which were then insured by the Federal Deposit Insurance Corporation, the sum of about \$36,640.00 belonging to and in the care, custody, control, management and possession of the said bank, and RAYMOND LEO COWLES and John Doe, in committing the aforesaid offense, did put in jeopardy the lives of Alice A. Kingsbury, Katherine J. Olszewski, and Myrna Cauley, by means and use of a dangerous weapon, that is, a gun.

In violation of Title 18, United States Code, Sections 2113(d) and 2.

COUNT IV

THE GRAND JURY FURTHER CHARGES:

On or about August 30, 1973, in the Northern District of New York, at Pamela, New York, RAYMOND LEO COWLES and John Doe, a person whose name is to the grand jurors unknown, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit the following offense against the United States of America:

1. To take and carry away, with intent to steal and purloin, from the Marine Midland Bank-Northern, the deposits of which were then insured by the Federal Deposit Insurance Corporation, money belonging to and in the care, custody, control, management and possession of the said bank, in violation of Title 18, United States Code, Section 2113(b).

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, RAYMOND LEO COWLES and John Doe performed the following overt acts:

1. The allegations set forth in Counts I, II, and III hereinabove are realleged.
2. On August 30, 1973, RAYMOND LEO COWLES and John Doe did drive to, and park outside, the Marine Midland Bank-Northern, Pamalia, New York.

In violation of Title 18, United States Code, Section 371.

A TRUE BILL

FOREMAN OF THE GRAND JURY

UNITED STATES ATTORNEY

